
APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-1937

[Filed June 13, 2007]

FREDY HUGO PENA-MURIEL,	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES,	)
ATTORNEY GENERAL,	)
Respondent.	)
	)

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Boudin, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

Ronald Olen, for petitioner.

Papu Sandhu, Senior Litigation Counsel, *Michael J. Sullivan*, U.S. Attorney, *Frank Crowley*, Special

Assistant U.S. Attorney, *Peter D. Keisler*, Assistant Attorney General, and *David M. McConnell*, Deputy Director, on brief for respondent.

LIPEZ, *Circuit Judge.* Noting that a court has now vacated the criminal conviction on which his removal proceedings were premised, Fredy Hugo Pena-Muriel asks us to vacate the Bureau of Immigration Appeals' ("BIA") decision refusing to reopen his removal proceedings. Pena-Muriel argues that a change in immigration law or, alternatively, principles of due process require such a reopening, even though he left the country before he petitioned the government to reopen his deportation proceedings. We reject his arguments and deny the petition for review.

I.

Pena-Muriel, a native and citizen of Bolivia, was admitted to the United States in 1970, when he was less than two years old. After residing in the United States as a lawful permanent resident for twenty-seven years, Pena-Muriel was convicted of domestic assault in February 1997 under R.I. Gen. Laws §§ 11-5-3 and 12-29-5; he received a one-year suspended sentence and probation. As a result of his conviction, Pena-Muriel was placed in removal proceedings. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (providing for deportation of aliens convicted of an aggravated felony); and *id.* § 1227(a)(2)(E)(i) (same for crimes of domestic violence). An Immigration Judge ("IJ") ordered Pena-Muriel removed to Bolivia in August 1997. Pena-Muriel neither applied for relief from the order nor appealed the IJ's decision. He subsequently left the United States.

In March 2002, Pena-Muriel's Rhode Island conviction was vacated on the basis of an affidavit from the victim stating that Pena-Muriel "should not have been charged" without further elaboration. The victim simply said: "I am not at liberty to explain why." Shortly thereafter – but roughly five years after his departure from the United States – Pena-Muriel moved to reopen his removal proceedings based on the vacatur of his conviction. The IJ denied the motion to reopen, citing 8 C.F.R. § 3.23(b)(1) (now designated at 8 C.F.R. § 1003.23(b)(1)), which states: "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings *subsequent to his or her departure from the United States*." (emphasis added). The BIA summarily affirmed the IJ's decision in February 2003.

Months later, Pena-Muriel filed a petition for a writ of habeas corpus in the District of Massachusetts. Upon the government's motion, the case was transferred to the First Circuit as a petition for review pursuant to section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. *See Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) ("Section 106 of the REAL ID Act amended 8 U.S.C. § 1252(a) so that a petition for review filed with the appropriate court is now an alien's exclusive means of review of a removal order. While limiting the avenues of judicial review, the REAL ID Act expanded courts of appeals' jurisdiction to consider constitutional and legal questions presented in a petition for review. § 1252(a)(2)(D). Congress believed that '[b]y placing all review in the courts of appeals, [the REAL ID Act] would provide an 'adequate and effective' alternative

to habeas corpus.'" (quoting 151 Cong. Rec. H2813-01) (citation omitted)).

Pena-Muriel now argues that Congress abrogated the regulation precluding consideration of a motion to reopen after an alien has departed the country when it passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.). IIRIRA amended the Immigration and Naturalization Act ("INA"), in relevant part, by removing 8 U.S.C. § 1105a(c) (1994) (repealed 1996), which stated: "An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order." Describing 8 C.F.R. § 1003.23(b)(1) as "linked" to this statutory provision, Pena-Muriel argues that the deletion of § 1105a(c) invalidated the regulation. Alternatively, Pena-Muriel argues that allowing his deportability to be premised on a vacated conviction violates his Fifth Amendment due process rights.

II.

A. The Statutory Claim

The premise of Pena-Muriel's statutory claim – that the regulation on which the BIA based its dismissal was inextricably linked to the language of the superseded statute – is wrong. At the time the regulation was adopted, there was no statutory authority for a motion to reopen. *See INS v. Doherty*,

502 U.S. 314, 322 (1992).[1] Instead, the regulation arose from the Attorney General's broad discretion to regulate relief from deportation orders. *See Goncalves v. INS*, 6 F.3d 830, 832 (1st Cir. 1993) (recognizing that "Congress intended the Attorney General to have considerable leeway in working out the precise procedures for determining contested issues related to deportation and 'discretionary relief'"). The Attorney General's authority to prohibit consideration of motions to reopen from aliens who have departed the United States did not originally depend upon the statutory language in § 1105a(c). Thus, the removal of that statutory language by IIRIRA does not abrogate the Attorney General's authority to continue to enforce the limitations of 8 C.F.R. § 1003.23(b)(1).

Pena-Muriel also argues that, by deleting the language of § 1105a(c), Congress signaled its intent that the Attorney General should no longer enforce 8 C.F.R. § 1003.23(b)(1). The Attorney General counters that the statutory change signals no such intention. The parties point to no statutory language that explicitly addresses the issue. As the Supreme Court has stated, where a statute is silent or ambiguous on the issue at hand, we must "defer to a reasonable construction by the agency charged with its implementation." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)).

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[1] With IIRIRA's enactment, motions to reopen were transformed from a regulatory to a statutory form of relief. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1283-84 (9th Cir. 2005) (discussing IIRIRA's codification of the reopening procedure).

In challenging the reasonableness of the Attorney General's interpretation of the INA amendments as they relate to the reopening issue, Pena-Muriel cites due process concerns expressed during testimony before the House Judiciary Committee preceding IIRIRA's passage:

> The administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens.

Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service). Pena-Muriel argues that Congress, motivated by due process concerns to reinstate judicial review despite an alien's departure, would be similarly motivated to permit motions to reopen administrative proceedings by persons subject to removal, deportation, or exclusion proceedings after they have left the country.

Pena-Muriel misunderstands the context of the due process concerns expressed in the congressional testimony. Prior to IIRIRA, "an alien seeking review of a deportation order was entitled to an automatic stay pending the completion of that review." *Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003). IIRIRA "altered that paradigm," instead "requir[ing] a review-seeker to ask the reviewing court for a stay of removal," *id.*, and raising the standards that must be met in order to

receive such a stay. *See Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 475 (1999) (noting that IIRIRA "repealed the old judicial-review scheme set forth in § 1105a and instituted a new []and significantly more restrictive[] one"). Because this change would result in the deportation of many aliens while they were awaiting judicial review, Congress amended the INA to allow these aliens to continue litigating their appeals from abroad. *See Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001) (recognizing, in this limited context, that "deportation no longer forecloses judicial review").

Understood against this background, the testimony cited by Pena-Muriel does not advance his position. Indeed, the concern expressed about "multiple layers of judicial review" reflects an intent to reinforce the finality of removal decisions. With the amendments to the INA, Congress allowed post-departure appeals of the BIA's original order of deportation, thereby protecting the alien's first opportunity to challenge a deportation order in court. That change does not remotely support an argument that Congress also intended, implicitly, to allow post-departure petitions to reopen a closed administrative proceeding.

The government also points out that IIRIRA enacted strict time limits for the filing of motions to reopen and limited aliens to a single filing. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1286 (9th Cir. 2005) (noting that before IIRIRA "motions to reopen were never time-barred"); *Sidikhouya v. Gonzales*, 407 F.3d 950, 951-52 (8th Cir. 2005) (explaining that IIRIRA allows aliens to file a "single motion to reopen at the conclusion of removal proceedings"). Yet, Congress

remained silent regarding the long-standing regulatory bar imposed by 8 C.F.R. § 1003.23(b)(1). Citing Supreme Court precedent, the government argues that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commod. Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The government's insistence that the Attorney General's interpretation was the one intended by Congress may be overreaching. Nevertheless, this precedent supports the reasonableness of the Attorney General's interpretation of the effect of the statutory change on the regulatory bar imposed by 8 C.F.R. § 1003.23(b)(1) on motions to reopen.

B. The Due Process Claim

Pena-Muriel argues that allowing his deportation order to stand on the basis of a criminal conviction that has since been vacated violates his constitutional right to due process. We disagree.

Pena-Muriel cites a variety of cases for the principle that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." *De Faria v. INS*, 13 F.3d 422, 423 (1st Cir. 1993); *see also Alim v. Gonzales*, 446 F.3d 1239, 1249-50 (11th Cir. 2006); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1128-29 (10th Cir. 2005). However, the fact that a vacatur may be an "appropriate" basis for reopening a deportation

order does not establish a due process right to such reopening after one has departed the country.[2]

It is well-established that aliens are entitled to due process in deportation proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993); *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997). In this context, due process requires that the alien receive notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal. *Choeum*, 129 F.3d at 38. Pena-Muriel received due process in his deportation proceedings. At the time of his departure, Pena-Muriel had been convicted of crimes triggering deportation provisions. His removal proceeding came to a lawful conclusion before his conviction was vacated. With the benefit of appropriate notice, he received a hearing before an IJ and the opportunity for an administrative appeal to the BIA. He waived an appeal to the BIA after he was ordered removed. He made no attempt to vacate his conviction prior to his departure; and he voluntarily left the country. He makes no claim that the IJ's removal order in 1997 was invalid or constitutionally infirm.

Now Pena-Muriel seeks to reopen proceedings that ended roughly ten years ago, on the basis of a vacatur that occurred five years after he voluntarily removed himself from the country. Due process does not require continuous opportunities to attack executed removal

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[2] In addition, Pena-Muriel's situation is distinguishable from these cases because each of them involved convictions that were vacated before the removal proceedings had terminated and while each petitioner remained in the country.

orders years beyond an alien's departure from the country. Indeed, there is a strong public interest in bringing finality to the deportation process. *See Baez v. INS*, 41 F.3d 19, 24 (1st Cir. 1994) (noting "Congress's intention to eliminate excessive appeals and lend finality to the deportation process").

III.

For the foregoing reasons, we deny the petition for review.

So ordered.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A30-663-990 - Boston

Date: FEB 6, 2003

In re: PENA-MURIEL, FREDY HUGO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Watt Jr., Robert D., Esquire

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

[Dated: June 29, 2002]

[File: A30 663 990]

In the Matter of	)
	)
Fredy Hugo PENA-MURIEL,	)
Respondent.	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("the Act") [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of a Crime of Domestic Violence, a Crime of Stalking, or a Crime of Child Abuse, Child Neglect, or Child Abandonment

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Robert D. Watt, Jr.
84 Ship Street
Providence, RI 02903

ON BEHALF OF SERVICE:
Assistant District Counsel
Trial Attorney Unit - INS
JFK Federal Bldg., Rm. 425
Boston, Massachusetts 02203

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 17, 1997, the Immigration and Naturalization Service ("the Service") personally served Respondent with a Notice to Appear ("NTA"). *See* Exhibit 1. In the NTA, the Service alleged that Respondent, a native and citizen of Bolivia, was admitted to the United States at or near Miami, Florida on or about September 27, 1970 as an immigrant. *See id.* The Service further alleged that on February 19, 1997, Respondent was convicted in Providence District Court, Providence, Rhode Island for the offense of Domestic Assault in violation of R.I. Gen. Laws §§ 11-5-3, 12-29-5. *See id.* For this offense, Respondent received a one year suspended sentence. *See id.* Accordingly, the Service charged Respondent with being removable pursuant to section 237(a)(2)(E)(i) of the Act. *See id.*

The Court held master calender hearings on July 31, 1997 and August 14, 1997. At the hearing on August 14, 1997, Respondent submitted written

pleadings in which he admitted factual allegations #1-5 contained in the NTA, conceded removability as charged, designated Bolivia as the country for deportation purposes, and requested time to appeal his state criminal conviction. *See* Exhibit 2. As evidence of Respondent's removability, the Service presented the Court with a certified copy of Respondent's criminal record. *See* Exhibit 3. Based on Respondent's admissions, the Court ordered Respondent be removed to Bolivia. No appeal has ever been filed in this case.

On May 16, 2002, Respondent, through counsel, filed a motion to reopen his removal proceedings. In his motion, Respondent asserts that the Domestic Assault conviction that served as the basis for removability has been vacated and dismissed.[1] As such, Respondent requests that the Court reopen his removal proceedings and rescind the order of removal.

As of the date of this decision, the Service has not filed a response to Respondent's motion to reopen. Therefore, Respondent's motion will be deemed unopposed. *See* 8 C.F.R. § 3.32(b)(1)(iv)(2002); Local Operating Procedure # 3.4.

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[1] In support of his motion, Respondent submitted certified copies of the following documents: (1) Order of the District Court, Sixth Division, State of Rhode Island vacating Respondent's pleas of nolo contendre; (2) Dismissal by Prosecution; and (3) Affidavit of Respondent's girlfriend, the alleged victim of the Domestic Assault offense.

II. Law

The Court may reopen a case unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 3.23(b)(1) (2002). A motion to reopen must be filed within 90 days of the date of entry of the final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 3.23(b)(1); INA § 240(d)(6)(C)(2002). A motion to reopen shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. 8 C.F.R. § 3.23(b)(1).

III. Analysis

In the motion to reopen, Respondent's counsel states that Respondent is not currently residing in the United States. Given that Respondent departed the United States after he was ordered removed, the Court no longer has jurisdiction to consider motions to reopen made on his behalf. *See* 8 C.F.R. § 3.23(b)(1).

ORDER

IT IS ORDERED that Respondent's Motion to Reopen removal proceedings be, and the same is hereby DENIED FOR LACK OF JURISDICTION.

6/29/02
Date

/s/
WILLIAM P. JOYCE
United States Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-1937

[Filed October 24, 2007]

FREDY HUGO PENA-MURIEL, Petitioner,	)
v.	)
ALBERTO GONZALES, ATTORNEY GENERAL, Respondent.	)

Before Boudin, Chief Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge.

ORDER OF THE COURT

In this petition for panel rehearing, petitioner argues for the first time that the text of 8 U.S.C. § 1229a(c)(7)(A), a provision added to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, which states that "[a]n alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen

described in subparagraph (C)(iv)," unambiguously provides an alien the right file a motion to reopen either from within the United States or abroad.

When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States, 8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7). We will not address that issue now on rehearing. *See American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993) ("[A] party may not raise new and additional matters for the first time in a petition for rehearing.").

The petition for panel rehearing is denied.

By the Court:

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-1937

[Entered October 24, 2007]

FREDY HUGO PENA-MURIEL,
Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL,
Respondent.

Before Boudin, Chief Judge, Torruella, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF THE COURT

The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing en banc be denied.

By the Court: